No. 2598

United States

Circuit Court of Appeals

For the Ninth Circuit.

GREAT NORTHERN RAILWAY COMPANY, a Corporation,

Plaintiff in Error,

vs.

HERBERT L. ENNIS and GUY W. ENNIS,

Defendants in Error.

Supplemental Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Montana.

In the District Court of the United States in and for the District of Montana.

No. 960.

HERBERT L. ENNIS, et al.,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY,

Defendant.

BE IT REMEMBERED, that on November 3d, 1915, the above-named defendant, Great Northern Railway Company, filed in said cause its praecipe for a Supplemental Transcript on Writ of Error herein, as follows, to wit: [1*]

In the District Court of the United States in and for the District of Montana.

No. 960.

HERBERT L. ENNIS, et al.,

Plaintiffs,

vs.

G. N. RY. CO.,

Defendant.

Praecipe [for Supplemental Transcript of Record].

The clerk of said court will please send to the Circuit Court of Appeals at San Francisco, the following papers (part of the record of the proceedings herein, under rule 14 of said court) omitted from the previous praecipe, as a supplement to the transcript on the writ of error herein, to wit:

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*Page-number appearing at foot of page of Original Certified Transcript of Record.

(1) Opinion of the Court on sustaining demurrer to 1st amended complaint.

(2) Opinion of the Court on overruling petition for a new trial.

(3) Plaintiffs' proposed amendments to defendant's bill of exceptions taken at the trial.

(4) Order of Nov. 18, 1914, in minute book, showing settlement of bill and argument of motion for a new trial.

Dated Nov. 3d, 1915.

VEASEY & VEASEY,
Attorneys for Defendant.

Filed Nov. 3d, 1915. Geo. W. Sproule, Clerk.

[2]

No. 960.

HERBERT L. ENNIS and GUY W. ENNIS,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, and JOHN HAMILTON,
Defendants.

Order and Decision.

The demurrer to the amended complaint herein is hereby sustained.

The case presented by the amended complaint is one of implied invitation by the defendant company to the general public to use a way prepared by it for that purpose across its premises, and nothing more. The crossing having been by the defendant company prepared like a public highway, nothing more was

necessary to make the use thereof by implied invitation. For all that appears, the public and the plaintiffs's intestate had full knowledge that the crossing was of that character. The crossing is alleged to be a private way used by the public. The rule is well settled that a user of such a way, like any invitee upon any other premises of another, takes the hazard of all patent defects therein and is entitled to protection only against wilful injury or snares or dangers known to the owner and not to the invitee. Thomp., Neg. sec. 1015, 1228; 1 Add. Torts, sec. 258; Ry. Co. vs. McDonald, 152 U. S. 269; Montague v. Hanson, 38 Mont. 384. Those who are not content therewith can decline the invitation. [3]

In this case the defect is alleged to have existed, exposed to view, for nearly four months. It follows the amended complaint shows no duty violated by the defendant company, and hence the question of contributory negligence and pleading thereof is not involved. This ruling follows from a reasonable construction of the complaint, taking it as having set out the case as favorable to plaintiff as the facts will bear. The complaint will not bear the construction, though it shadows it, that the defendant company held out the crossing as a highway, inducing the public and plaintiffs' intestate to believe it was a highway and to use it as such, which, under settled principles of law, would impose on said company coextensive duty and liability.

See 29 Cyc. 451; Plumer v. Dill, 31 N. E. (Mass.) 130; Sweeney v. Ry. Co., 87 Am. Dec (Mass.) 652; Beck v. Carter, 23 Am. Rep. (N. Y.) 182.

June ——, 1912.

GEO. M. BOURQUIN,
Judge.

Filed June 29, 1912. Geo. W. Sproule, Clerk.

[4]

[Opinion on Motion for a New Trial.]

United States District Court, Montana.

ENNIS vs. RY. CO.

Defendant's motion for a new trial is urged mainly upon the ground that the Court's conduct during the trial prejudiced the jury against defendant. At the close of the testimony defendant excepted generally that the Court "ruled against us too frequently and has hampered us in the examination of witnesses and your Honor's demeanor toward us may have affected the jury." All this was taken as a challenge to the Court's rulings and as counsel's inference that this hampered his examination and constituted improper demeanor and attitude on the part of the Court. Upon argument herein few rulings have been questioned, but now it is urged the demeanor and attitude complained of is that the Court "unwittingly ridiculed before the jury every defense interposed by the defendant." In aid of this, counsel points out observations by the Court in rulings and otherwise, contained in the bill of exceptions, and requests the Court to "remember the tone of voice in which they were made." In view thereof

the bill of exceptions has been scrutinized and to some extent corrected by the Court of its own motion, to accord with the facts. For instance, the first correction on page 61 was of purported comment inane in extreme; the second on said page was of like comment involving stultification in view of the earlier attitude of the Court set out on pages 57, 58. That on page 69 supplies an omission of importance in view of the complaint in respect to what immediately followed. And others are to meet failures to secure, transcribe or insert accurately all material that occurred. Even as it is, the bill is unsatisfactory from omissions and inaccuracies perhaps tending to false impressions. [5]

The Court's comments are given a restricted and abrupt aspect contrary to the fact. All that was said and done is not definitely remembered, and the Court knows the stenographer's great difficulty in securing all, and greater, in transcribing it. The bill is doubtless as correct in its material aspect as can now be arrived at. But the Court also knows that neither in language, tone or demeanor did it display ridicule or other improper emotion or sentiment towards defendant or its counsel or cause. It did not perceive and does not believe the jury was prejudiced against defendant. If it was, however, the Court inclines to believe it was due to counsel's tactics, for instance, repeated demands that plaintiff perform a miracle for his benefit by instantly producing a witness from without the State, and the like, or by his lack of tact in bluntly arguing to the jury that plaintiff was not entitled to a substantial

recovery in that "a wife is a liability and not an asset," and iterating and reiterating this harsh and impossible contention until made ridiculous by opposing counsel's withering sarcasm and comment that doubtless plaintiff should be grateful for that defendant urged no counterclaim for services in relieving plaintiff of an incubus by killing his wife. The rebuke administered to counsel of which he mainly complains was invited and compelled by his over-zeal throughout the trial, perhaps unwittingly, in insisting upon argument after objections ruled upon, under the guise of "stating our position," "stating our view of the law," etc., and to a far greater extent than the bill of exceptions discloses. Not only does this misdirected energy grow wearisome, but persistent statements by counsel before the jury of his views of law opposed to the Court's rulings, are highly improper in that at the close of a long trial, [6] in the jury-room the jury is apt to confuse counsel's law with the Court's instructions and follow the former by mistakenly believing it was of the latter.

And argument subsequent to rulings is mere wrangling and intolerable. The only regret is that the occasion arose and that it would seem the Court's remarks were less dignified than is desirable. Any consequent prejudice, however, would be to the Court's esteem.

The Court further inclines to believe that a more or less mistaken conception of rights and duties influences counsel to imagine prejudice. An inkling of this is found in his superfluous insertion on page 14 of the bill that the Court interrupted a

witness of plaintiff's under cross-examination and without any previous objection by counsel for plaintiff, clearly a challenge of the Court's duty to confine evidence to the issues and an intimation that the exercise of this duty manifested bias for plaintiff and prejudice for defendant. So in his general exception at the conclusion of the evidence it would appear counsel inclined to the view that the Court's rulings ought to be somewhat evenly apportioned, for he founds a complaint of prejudicial demeanor rather on the quantity of adverse rulings than on their quality. So of his complaint in argument hereon, that the Court admonished his witness under cross-examination not to volunteer information, again a challenge of the Court's right to require witnesses to keep within legal bounds. So of his like complaint that when he was examining his own witness, coercingly and impeachingly as it seemed to the Court, the Court qualifiedly approved the witness' testimony. So at argument hereon, he complains in substance that at a former and abortive [7] trial of this action "the jury was with us from the beginning but in this trial it seemed against us all along," displaying no less satisfaction that the former and a partial jury gave defendant an unfair advantage, than resentment that the latter and as assumed like jury reversed the situation. Now it well may be that not observing in the latter jury any special favor for defendant, counsel, disappointed, concluded it was prejudiced against him, so prone are some to believe that those not for them are against them. The Court perceived nothing

and knows nothing impeaching the fairness and fidelity of the jury herein. The Court is of the opinion that upon the evidence a verdict for plaintiff is well warranted. As a matter of fact the history of this cause tends to the belief that counsel, most zealous for his client, as always, has nursed somewhat of a grievance in that the case did not terminate upon some objection or motion but went to trial and to a jury. These observations are not a pleasing task but are compelled, demanded by truth, and more to conserve the rights of plaintiff than by any solicitude personal to the presiding Judge.

In brief reference to some of counsel's contentions, that plaintiff remarried since the trial is not a ground for a new trial. It neither mitigates nor aggravates damages. There was no denial that the driver drank. Hence, his habits were not material. In view of all facts and circumstances of this case, such habits were incompetent to raise a presumption that on the occasion involved he had drank to excess, from which to presume he drove negligently, from which to presume his negligent driving contributed to the injury complained of —presumptions upon presumptions. There was no direct evidence the driver was negligent, contributing to the injury.

See 115 Fed. 275.

Thompson vs. Bowie, 4 Wall. 463. [8]

Depositions taken, either party is entitled to use all of them, direct and cross. On a trial, a party is not limited to the benefit accruing from his own witnesses and their direct examination, but may

avail himself of that of the opposing party's witnesses and of that party's cross-examination of the other's witnesses. Hence, neither party can withdraw any part of a deposition against the will of the other. The demand that the driver be produced, the attempt to introduce evidence of his contradictory statements without foundation laid as the state statutes require, the endeavor to impeach its own witnesses, and the like wherein rulings were against defendant, need nothing here.

In respect to excessive damages, the local law is that for wrongful death damages are such as under all the circumstances may be just. Though wholly pecuniary, not only cost of replacing services lost (and what is the cost of replacing a wife's bare labors with hired domestics—one or two or more—their wages, maintenance, lack of her economies, etc.) but society, companionship, affection, comfort and counsel of a wife may be considered to that end in an action by the injured husband. Mize case, 38 Mont. 535.

The amount must be left to turn mainly upon the sound sense and deliberate judgment of the jury. See Ry. Co. vs. Barron, 5 Wall. 106.

If, in an amount greater than the Judge might allow, not to be held excessive unless flagrantly so, creating a presumption due to passion or prejudice; for the Court is not to substitute its judgment for that of the jury.

Nilson's Case, 47 Mont. 416.

Even those who will not agree with Solomon that

the value of [9] a good wife is above rubies, will concede that in large part her husband's future and financial success depend upon her. And her loss late in life, after years of association, is virtually the end of his endeavor, is the end of the world for him. That in the past in like cases lesser amounts have been held excessive is not persuasive. All values have advanced. New precedents must arise. The Court is not able to say the jury's judgment was not honest and is not supported by the evidence. The motion for a new trial is denied.

BOURQUIN, J.

Jan., 1915.

Filed January 14, 1915. Geo. W. Sproule, Clerk. [10]

In the District Court of the United States for the District of Montana.

HERBERT L. ENNIS et al.,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY et al.,

Defendants.

Plaintiffs' Amendments to Defendants' Proposed Bill of Exceptions.

Now come the plaintiffs above named and present for allowance the following amendments to defendants' proposed bill of exceptions in the above-entitled cause:

1. On page 20, line 27, of said proposed bill, be-

ginning with the words "Yes, sir," on said line, strike out the words "referred to" and the next succeeding words on said line; also all of the words on line 28 and the words "runaway" on line 29; the same being "Yes, sir, I did expect that the carcass would frighten the horses to such an extent that they would run away," and insert in lieu thereof the following:

"Q. You did not expect that the carcass would frighten the horses to such an extent that they would run away, did you? A. Yes, sir."

2. On page 20, line 31, begin a new paragraph with the words "No, sir," continuing the testimony thereafter as it appears on said page after the words "No, sir" last referred to.

3. On page 98, lines 8 to 27 inclusive of said proposed bill of exceptions, strike out all of the matter set forth.

R. O. LUNKE,
WALSH, NOLAN & SCALLON,
Attorneys for Plaintiffs.

Due personal service of within amendments made and admitted and receipt of copy acknowledged this 22d day of October, 1914.

VEAZEY & VEAZEY,
Attys. for Deft. G. N. Ry. Co.

Filed Oct. 23, 1914. Geo. W. Sproule, Clerk. [11]

[Minutes, November 18, 1914, the Settlement of Bill of Exceptions, etc.]

In the District Court of the United States in and for the District of Montana.

No. 960.

H. L. ENNIS et al.,

vs.

GREAT NORTHERN RY. CO. et al.

This cause came on regularly at this time for settlement of defendants' bill of exceptions and hearing on motion for new trial, I. Parker Veazey, Jr., Esq., appearing for the defendants, and C. B. Nolan, Esq., appearing for the plaintiffs.

Thereupon the bill of exceptions was duly settled, the same to be signed and allowed when properly engrossed and presented.

Thereupon motion for new trial was duly argued by counsel, submitted and taken under advisement by the Court.

Entered in open court, November 18th, 1914.

GEO. W. SPROULE,
Clerk. **[12]**

[Certificate of Clerk U. S. District Court to Supplemental Transcript of Record.]

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Cir-

cuit, that the foregoing volume of 12 pages, is a full, true, correct and compared transcript of the original Praecipe for Supplemental Transcript and of the two Opinions, Proposed Amendments to Bill of Exceptions, and Order of November 18, 1914, mentioned in said Praecipe for Supplemental Transcript, now remaining on file and of record in my office as such clerk.

I further certify that the costs of this Supplemental Transcript amount to the sum of $5.20, and have been paid by the plaintiff in error.

WITNESS my hand and the seal of said court at Helena, Montana, this 13th day of November, A. D. 1915.

[Seal] GEO. W. SPROULE,
Clerk.

[Ten Cent Internal Revenue Stamp Canceled, 11/13/1915. G. W. S.]

[Endorsed]: No. 2598. United States Circuit Court of Appeals for the Ninth Circuit. Great Northern Railway Company, a Corporation, Plaintiff in Error, vs. Herbert L. Ennis and Guy W. Ennis, Defendants in Error. Supplemental Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Filed November 16, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.